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No. 08-1173

IN THE

Supreme Court of the United States

**AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
*Petitioner,***

v.

**DALLAS AREA RAPID TRANSIT,
*Respondent.***

**On Petition for a Writ of Certiorari to the
Supreme Court of Texas**

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF FOR AMALGAMATED TRANSIT UNION,
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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MOTION FOR LEAVE TO FILE BRIEF

Amalgamated Transit Union (hereinafter “ATU” or “the International Union”), an international labor organization comprised of 267 affiliated local unions representing employees in the transit industry, primarily bus and train operators and mechanics, files this motion pursuant to Supreme Court Rule 37.2 (b) for leave to file an *amicus curiae* brief in support of Petitioner Amalgamated Transit Union Local No. 1338’s Petition for Writ of Certiorari.

On March 27, 2009, ATU sent a letter to all parties in the case, notifying of its intention to file an *amicus* brief and seeking consent from all parties. On March 31, 2009, Respondent, Dallas Area Rapid Transit (herein “DART”), sent a letter responding that DART “does not consent to” and “opposes the

filing of such a brief," without offering any explanation whatsoever for its opposition. Petitioner Amalgamated Transit Union Local No. 1338 (hereinafter "Local 1338" or "Petitioner") consented to the filing of this brief and its letter of consent has been filed with the Clerk. Since Respondent DART has withheld its consent to the filing of an *amicus curiae* brief, ATU hereby files a Motion for Leave to File Brief in order to file the included *Amicus Curiae* Brief prior to the Court's consideration of the Petition for Writ of Certiorari in this matter.

For the reasons set forth more fully in the statement of interest, ATU is very concerned, on behalf of the overwhelming majority of its members, about the decision of the Texas Supreme Court in this case. This concern is based upon the International Union's representation of tens of thousands of employees throughout the United States whose rights and interest are protected by Section 13(c)¹ arrangements, many of whom could be adversely impacted if the ruling in this case is allowed to stand.

ATU seeks an opportunity to be heard in this matter to present information and perspectives in addition to, and in some respects broader than, those already presented by Petitioner, Local 1338. Because of the International Union's direct interest and involvement in overseeing and administering hundreds of Section 13(c) arrangements and/or collective bargaining agreements reached pursuant to Section

¹ For simplicity, throughout this motion and the brief, reference will be made to Section 13(c) which was originally enacted as part of the Urban Mass Transit Act of 1964 (UMTA). UMTA is now known as the Federal Public Transportation Act. The employee protection provision of the statute was formerly cited as 49 U.S.C. 1609(c), but is currently codified at 49 U.S.C. § 5333(b).

13(c) arrangements, the decision in the instant case could have a significant and adverse impact on a large number of its members. Accordingly, Amalgamated Transit Union as *amicus curiae* respectfully requests that this motion be granted and its brief accepted and considered in support of the Petitioner's Writ of Certiorari.

Respectfully submitted,

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**BRIEF FOR AMALGAMATED TRANSIT UNION,
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

INTEREST OF *AMICUS*¹

ATU is an international labor organization which has 267 affiliated local unions in the United States and Canada, with an overall membership of more than 189,000 members, including retirees. Of these members, there are approximately 122,000 active

¹ No counsel or party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

members in the United States (153,000 including retirees). These members work primarily in the transit industry and to a large extent are bus and train operators (drivers) and mechanics working in a variety of settings such as for local transit authorities, commercial over-the-road bus operations (e.g., Greyhound) or school bus service providers.

A large number of these affiliated locals represent employees who work for employers that receive Federal Transit Authority ("FTA") money, which requires the employer to reach what is commonly referred to as "Section 13 (c) arrangements" as a precondition to the award of such funding. One of the purposes of these Section 13(c) arrangements is to protect collective bargaining rights which existed prior to the acquisition of privately owned transit companies (with federal funding) by state and local governmental entities. As a by-product of that protection, many of ATU's affiliate locals are parties not only to Section 13(c) arrangements, but also to traditional collective bargaining agreements. Others, like Petitioner, Local 1338, have alternative protections pursuant to Section 13 (c) arrangements which result in employment terms and conditions embodied not in a collective bargaining agreement *per se*, but some kind of "meet and confer" provisions.

These Section 13(c) arrangements can apply whether the members work directly for a public body or for a private sector management company which manages the operation for a public entity, or even for a commercial bus company providing over-the-road services where the employer has obtained federal money to help buy lifts to be ADA compliant. In many of these cases, the arrangement includes a governmental entity as actual party to the arrangement

or that governmental entity has substantial control over the management company which is a party. In each instance, receipt of federal funds is contingent upon entering into a Section 13(c) arrangement to protect, in part, existing bargaining rights and continued funding is contingent upon certification of continued compliance with these requirements.

Throughout the United States, numerous local unions affiliated with the ATU are parties, together with regional transportation authorities, to Section 13(c) arrangements. In the vast majority of affiliated locals, there are 13(c) arrangements and traditional collective bargaining agreements, unlike the instant case where Texas law does not permit public employees to bargain collectively and therefore the arrangement between DART and Local 1338 provides for "meet and confer" procedures to address proposed changes in wages and working conditions, through what is known as a "general grievance." Potentially, in each and every one of these arrangements, or subsequent agreements reached pursuant to these arrangements, where the public entity is in some way a participant, the agreements are put in peril by the decision of the Texas Supreme Court in this case.

ATU is extremely interested in preserving the right to enforce Section 13(c) arrangements and/or agreements reached pursuant to such Section 13(c) arrangements. Since the Supreme Court made it clear in its decision in *Jackson Transit Authority v. Local Division 1285 Amalgamated Transit Union, AFL-CIO-CLC* that such agreements could not be enforced in federal court, in order to fully and effectively address the concerns expressed in the legislative history supporting the basis for Section 13(c), it is imperative that the local unions affiliated with ATU which have

participated in and negotiated Section 13(c) arrangements be able to enforce those agreements in state court. The rights of the workers which Congress originally sought to preserve with Section 13(c) will be "watered down" and exist in name only if there is no effective means to enforce those agreements in courts of the various states. For this reason, ATU seeks to appear as *amicus curiae* in support of Petitioner's petition for writ of certiorari in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15 (1982), the Court held that a union does not have a federal cause of action to sue in federal court to enforce the provisions of a "Section 13(c)"² arrangement or a collective bargaining agreement negotiated pursuant to such an arrangement against a local transit authority under the Urban Mass Transit Act of 1964, as amended, 49 U.S.C.A. §1609(c) (UMTA).³

Jackson Transit Authority taught that any such suit must be filed in state court and under state law. The Texas Supreme Court held in *Dallas Areas Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 2008 WL 5266379 (Tex. 2008), that Texas governmental immunity law is not preempted by Section 13(c) of UMTA and therefore,

² As previously noted, Section 13(c) is no longer actually so designated following the re-codification of the Transportation Code and the relevant provision is now 49 U.S.C. §5333(b). See fn. 1 above in Motion for Leave to file Brief.

³ UMTA is now known as the Federal Public Transportation Act, as amended.

that the local transit authority (in this case, DART) is immune from a breach of contract suit filed by a union in state court regarding an alleged violation of the parties' Section 13(c) arrangements or the resolution agreement reached pursuant to that arrangement.

ATU contends that the Texas Supreme Court's opinion taken in conjunction with the *Jackson Transit Authority* precedent, will open the door, certainly in Texas, but potentially in other jurisdictions as well, to a disturbing result calling into question the enforceability of Section 13(c) arrangements and agreements (including the many collective bargaining agreements to which ATU's affiliates are party). These Section 13 (c) arrangements and agreements which have been developed pursuant to the bargaining or alternative "meet and confer" process preserved through such a Section 13(c) arrangement, will exist in a no man's land where there can be no federal enforcement of such agreements pursuant to *Jackson*, but the alternative mechanism for enforcement that was anticipated as available to parties by the Justices deciding the *Jackson Authority* case would, in fact, not be available in Texas or any other state with similar statutes or constitutional provisions.

Thus, the impact of this Texas Supreme Court decision could be much more widespread than simply with respect to the single resolution agreement reached by Local 1338 and DART pursuant to their meet and confer procedure which is at issue in the instant case. If this decision is allowed to stand, it could result in a vacuum and absence of effective enforcement for many Section 13(c) arrangements throughout the country to which many of ATU's affiliates are parties. Potentially, there is a tremen-

ous impact on the stability of labor relations in a multitude of communities with mass transit systems that receive federal funding.

ARGUMENT

A. Reasons for Granting the Writ.

ATU agrees with Petitioner's arguments as set forth in its asserted reasons for granting the writ and will not restate these in detail here but urges that the writ be granted either because the *Jackson* decision implicitly held that state immunity law is pre-empted, or alternatively, if unresolved, the issue is an important federal question that should be resolved by the Supreme Court with a finding that the Supreme Court of Texas' ruling is repugnant to the Constitution and laws of the United States. ATU fully supports the arguments set forth in Local 1338's petition. As will be addressed in more detail below, ATU seeks to bring to the Court's attention the fact that the ruling of the Texas Supreme Court could potentially affect a much broader group of employees than just the employees of DART.

B. Issues Presented Potentially Have Widespread Impact on Employees Throughout the Country.

ATU desires to file this *amicus curiae* brief in order to set forth, in a broader context, the potential impact of matters raised by virtue of the Texas Supreme Court decision. As noted in the interest of amicus section above, ATU has numerous affiliates in the United States, the vast majority of which have members working for employers that are the beneficiary of financial assistance awarded by the Federal Transit Authority ("FTA"), which requires the employer to

reach Section 13(c) arrangements in order to receive federal funds. Many of ATU's affiliate locals are also parties to traditional collective bargaining agreements. Others, like Local 1338, have alternative protections pursuant to 13(c) arrangements which while not collective bargaining agreements *per se*, provide some protection for preservation of rights and benefits under previous collective bargaining relationships.

Numerous local unions affiliated with the International Union, throughout the United States, are parties to Section 13(c) arrangements, and in many cases, are also parties to traditional collective bargaining agreements. As noted by this Court in *Jackson Transit Authority*, Section 13(c) [now 49 U.S.C. 5333(b)] requires a state or local government to make arrangements to preserve transit workers' rights before that entity can receive federal assistance under the Act. 457 U.S. at 15.

In *Jackson Transit Authority*, the Court reviewed the Congressional intent behind Section 13(c) and acknowledged the concerns that while federal aid was necessary because of the precarious financial condition of many private transportation companies across the country, there was also a concern that public ownership could threaten existing collective-bargaining rights of unionized transit workers employed by private companies. In part to prevent federal funds from being used to destroy these rights, Congress included Section 13(c) which required as a condition of receipt of the funds that the Secretary of Labor certify that "fair and equitable arrangements" have been made to protect benefits under existing collective-bargaining agreements and the continuation of collective-bargaining rights. *Id.* at 17.

Most employers in the public transit industry, who employ members of the majority of the ATU affiliated locals in the United States, receive federal grants from the Federal Transit Authority (FTA) and must, in order to remain eligible for such federal funding, submit annual certifications and assurances to the FTA stating that they acknowledge their compliance with 49 U.S.C. 5333(b). *See Federal Register, Volume 16, No. 10, at 2458, No. 3, Private Mass Transportation Companies (Jan. 15, 2004).*

Pursuant to these many Section 13(c) arrangements, ATU affiliated locals throughout the United States enter into agreements (either traditional collective bargaining agreements or some other type of mutual understanding as with DART and Local 1338). The *Jackson Transit Authority* case made it clear that any Section 13(c) arrangement or collective bargaining agreement negotiated pursuant to such an arrangement could not be enforced in federal court but, instead, and like an ordinary contract, would be enforced in a private suit under state law. 457 U.S. at 20-21.

As noted above, the Supreme Court's opinion in *Jackson Transit Authority* discussed the Congressional history and intent in the passage of UMTA at great length. The Texas Supreme Court's opinion in the instant case is in direct conflict with the *Jackson* decision. In *Jackson*, the Court stated, "Indeed, since Section 13(c) contemplates protective arrangements between grant recipients and unions as well as subsequent collective bargaining agreements between those parties, it is reasonable to conclude that Congress expected the Section 13(c) agreements and the collective bargaining agreements, like ordinary contracts, to be enforceable by private suit upon breach." *Id.* (citations omitted). This was emphasized in foot-

note 13 of the Court's opinion where it stated, "The union, of course, can pursue a contract action in state court. In addition, the Federal Government can respond by threatening to withhold additional financial assistances." *Id.* at fn. 13. Further, in their concurring opinion, Justices Powell and O'Connor added, "Congress here provided for the making of contracts that it must have intended to be enforced." *Id.* at 30 (Powell and O'Connor concurring).

Thus, as is pointed out so clearly by the *Jackson* opinion in the passages cited in the preceding paragraph above, the numerous 13(c) arrangements and the collective bargaining agreements between the parties to those arrangements, the grant recipients and ATU affiliated locals across the country, should be subject to enforcement, as would be any ordinary contract, by private suit upon breach in state courts.

But in the case of the vast majority of the Section 13(c) arrangements and collective bargaining agreements negotiated pursuant to these arrangements, potentially the same issue of enforceability presented here could arise should the ruling of the Texas Supreme Court be allowed to stand. In the first instance, certainly, on its face the Texas Supreme Court's holding will affect any other entity in Texas where there is a Section 13(c) agreement in place, either with a public entity as the sole employer, or as a party to the agreement. Of still greater potential significance, the Texas Supreme Court's holding could have a substantially broader impact as well, since there are other states with similar statutory or constitutional governmental immunity provisions. If the Texas Supreme Court's decision stands, moreover, additional states might undertake to pass governmental immunity provisions in the future. If so,

the 13(c) arrangements and collective bargaining agreements negotiated pursuant to such arrangements in all of those states could fall prey to the same circumstances should there be a breach by the governmental entity.

The Texas Supreme Court concluded that despite *Jackson Transit Authority* and UMTA, there is no preemption of Texas state laws which prevent governmental agencies such as DART from being sued for breach of contract. Therefore, in Texas (and, if the Texas Supreme Court's decision in the instant case is allowed to stand, potentially in any other state with similar statutory or constitutional governmental immunity provisions), if a transit authority breaches a Section 13(c) arrangement or an agreement reached between the parties through collective bargaining negotiations pursuant to a Section 13(c) arrangement, the union could sue the public entity but the suit would be dismissed based upon governmental immunity law. As noted in Local 1338's Petition, the first case reported following the Texas Supreme Court decision in *Dallas Area Rapid Transit v. ATU Local No. 1338*, another DART matter, *Lindsey v. Dallas Area Rapid Transit, et al.*, 2009 WL 453769 (N.D. Tex. 2009)(Civ. Action No. 3:08cv1096, February 23, 2009, Fish), reads the Texas Supreme court opinion in the instant case very broadly.

In all likelihood, it is only a matter of time before other transit authorities, in states where similar governmental immunity statutory provisions are on the books or are later enacted, decide that they too could ignore or breach their Section 13(c) arrangements or the collective bargaining agreements negotiated pursuant to those arrangements with impunity, in light

of the vacuum for enforcement created and suggested by the Texas Supreme Court's decision. If the decision is allowed to stand, the International Union's many affiliated locals which are parties to collective bargaining agreements pursuant to Section 13(c) arrangements with governmental entities throughout the country will be at risk of finding themselves in the same morass in which Local 1338 now finds itself. This quagmire, currently faced by Local 1338, consists of an endless repeating loop of grievance after grievance, after grievance, with no forum to go to for remedial assistance in the face of a breach of its Section 13(c) arrangement and its subsequent resolution agreement since *Jackson* teaches a union cannot go to federal court and yet now, apparently, the alternative state court breach of contract claims clearly anticipated by the *Jackson* court can seemingly be defeated by state governmental immunity provisions.

Clearly this is not the situation anticipated by the Court in its *Jackson Transit Authority* decision. Rather, it is clear from that opinion that the roadmap for unions faced with a breach of Section 13(c) arrangements, or the violation of an agreement negotiated pursuant to such an arrangement, was to file a breach of contract claim in state court. The inopportune outgrowth of the Texas Supreme Court decision in the instant case, if allowed to stand, therefore could have a substantial, detrimental impact on many of the members of the locals affiliated with ATU across the country.

CONCLUSION

For these reasons, ATU supports Petitioner's Petition for Writ of Certiorari and respectfully requests that certiorari be granted in this case.

Respectfully submitted,

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